SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 751

CHARLES A. MILLER,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION AND ELMER S. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of the State of Wisconsin, filed October 13, 1942, is reported in 5 N. W. (2d) 749, but is not yet reported in the official state reports. The decision on rehearing, filed December 8, 1942, has not yet been reported.

II.

Jurisdiction.

"Statement as to Jurisdiction" appearing in the Petition fully sets forth the statute and the grounds on which the jurisdiction of this Court is invoked and, for the sake of brevity, is not repeated herein.

III.

Statement of the Case.

A concise statement of the case containing all that is material to the consideration of the question presented, with appropriate page references to the printed record, will be found in the Petition under the heading "Summary Statement of the Matter Involved," and, for the sake of brevity, is not repeated herein.

IV.

Specification of Errors.

The petitioner assigns as error the ruling of the Supreme Court of the State adverse to the petitioner on each of the four questions presented for review in the Petition under the heading "Questions Presented," that is to say: (1) The State Court erred in holding that the State and its taxing authorities were not estopped from challenging, under the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, as against the petitioner, the constitutionality of the State statute in controversy requiring husband and wife to submit to taxation on the basis of their combined income, the State and its taxing authorities having availed themselves of the advantages thereof for a period of approximately twenty years, commencing with the year of the enactment

of the State Income Tax Act in 1911 and ending with the decision of this Court in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, decided November 30, 1931; (2) the State Court erred in holding that the Wisconsin Tax Commission, a creature of the State, was entitled to urge the unconstitutionality, under the due process clause of the Fourteenth Amendment of the Federal Constitution, of the State statute in controversy upon the facts in this case; (3) the State Court erred in disregarding the petitioner's waiver of the asserted unconstitutionality of the statute in controversy under the same clause of the Fourteenth Amendment; (4) the State Court erred in deciding adversely to the petitioner the question whether the constitutionality of this statute, under the due process clause of the Fourteenth Amendment, should not be upheld as valid legislation, it being still on the statute books of the State of Wisconsin, for the reasons set forth in the dissenting opinion of Justices Stone, Brandeis and Holmes in the case of *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, and the unanimous opinion of the Supreme Court of Wisconsin in *Hoeper* v. *Wisconsin Tax Commission,* 202 Wis. 493.

V.

ARGUMENT.

Summary of Argument.

QUESTION I.

Estoppel of the State of Wisconsin and its taxing authorities from challenging, under the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, as against the petitioner, the constitutionality of the state statute in controversy requir-

ing husband and wife to submit to taxation on the basis of their combined income, the State and its taxing authorities having availed themselves of the advantages thereof for a period of approximately twenty years, commencing with the year of the enactment of the State Income Tax Act in 1911 and ending with the decision of this Court in Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206, decided November 30, 1931.

The state supreme court, in the case of *Amerpohl* v. *Tax Commission,* 225 Wis. 62, at page 71, cited in its opinion herein, expressly recognized the rule that the State may not be heard to complain that its own enactment is void as a violation of the due process clause of the Federal Constitution, observing at page 71 that this rule and others were well established and required no discussion, but it went on to say, p. 72:

> "* * * It seems clear to us, however, that they have no application to this situation. This section (71.09) (4) (c) of the statute is not under any *present attack* for unconstitutionality. It has been declared unconstitutional by the supreme court of the United States. Respondents (Wisconsin Tax Commission) are required to respect and carry out the mandate of that court. The question here is as to the *effect* of that determination, and must necessarily be within the power of respondents to raise if they are to enforce the law in accordance with the decision." (Parenthetical matter and italics added).

The court in that decision, it is plain, subscribed to the doctrine of the absolute retroactivity of a law after it has once been declared unconstitutional by this Court, but this doctrine, the court will observe, as will be seen from decisions of this Court hereinafter cited, has been materially qualified.

In *Daniels* v. *Tearney*, 102 U. S. 415, at p. 421, this Court expressly ruled:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, *although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit.* In such cases the principle of estoppel applies with full force and conclusive effect." (Italics added).

The facts in that case were as follows: The plaintiffs in error, Daniel and others, had executed their bond for the purpose of staying execution upon a judgment in favor of one Porter, deceased, until the operation of the Ordinance of Secession hereinafter mentioned should cease. The defendants in error, Tearney and others, were the executors of his estate, and sought to enforce the obligations of the bond. The bond was given in pursuance of and in conformity with an Ordinance of Secession enacted by the State of Virginia at the commencement of the Civil War. Daniels and his co-obligors sought to avoid liability on the bond for the reason that the Ordinances of Session and all acts supplementary thereto had theretofore been declared unconstitutional by the United States Supreme Court. This Court said at p. 418, Vol. 102, U. S.:

> "That the Ordinance of Secession was void, is a proposition we need not discuss. The affirmative has been settled by the arbitrament of arms *and the repeated adjudications of this court.*" (Italics added).

But the court held in accordance with the ruling hereinbefore quoted that the principal obligor having enjoyed the benefits which the bond was intended to secure, it was then

too late to raise the question of its validity, notwithstanding the subsequently declared unconstitutionality of the Act under and by virtue of which it was executed.

This is exactly what the State of Wisconsin is doing in the case at bar. It has availed itself for its benefit of an unconstitutional law, and it cannot in this litigation with others than Hoeper, not in Mr. Hoeper's position, aver the unconstitutionality of the statute in question, although such unconstitutionality may have been pronounced by a competent judicial tribunal, to wit, the Federal Supreme Court, in another suit, to wit, the suit of Hoeper.

That unconstitutional tax acts are not within the exceptions noted in the *Daniels* case is expressly so ruled in *Wight* v. *Davidson,* 181 U. S. 371 at page 377, where the general principle is stated as follows:

> "* * * The constitutional right against unjust (i. e. unconstitutional) taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid." (Parenthetical matter added).

It is also manifest that tax acts are not within such exceptions from the case of *Shepard* v. *Barron,* 194 U. S. 553, hereinafter discussed under this head of the argument.

It must be steadily kept in mind that when the *Hoeper* case (284 U. S. 206) was decided, namely, November 30, 1931, petitioner had already paid his taxes and waived his constitutional right to attack the validity of the statute in question, and in passing it may be noted that this statute which was held to be unconstitutional with respect to Hoeper still remains on the State books, namely, Sec. 71.09 (4) (c) (Stats. 1941).

In the case of *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, decided January 2, 1940, the

Chicot County Drainage District, organized under the statutes of Arkansas, in a proceeding instituted by it to effect a plan of readjustment of its indebtedness under the Federal Act of May 24, 1934, providing for "Municipal-Debt Readjustments," had succeeded in readjusting its bonded indebtedness under the provisions of that Act. The Baxter State Bank, having held some of its bonds which had been issued prior to the Act, refused to surrender its bonds in conformity with the decree of the United States District Court confirming the plan of readjustment. After the entry of that decree the United States Supreme Court declared the Act of May 24, 1934, unconstitutional in the case of *Ashton* v. *Cameron County Water Improvement District No. 1 of Texas*, 298 U. S. 513. Thereafter The Baxter State Bank brought suit in the United States District Court of Arkansas to recover on the bonds by it held. The Drainage District pleaded the prior decree of the United States District Court of Arkansas in the readjustment proceedings as *res judicata*. The Bank demurred. Upon the issue thus raised, when carried to the United States Supreme Court, the latter held that notwithstanding the declared unconstitutionality of the Act of May 24, 1934, the State Bank was bound by its provisions. The doctrine there announced by the court in an opinion by Chief Justice Hughes is as follows (308 U. S. 374):

> "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. Norton *v.* Shelby County, 118 U. S. 425, Chicago, Indianapolis & Louisville Ry. Co. *v.* Hackett, 228 U. S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. *The actual existence of a statute, prior to such determination, is an opera-*

tive fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, *and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.* Without attempting to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appropriately confine our consideration to the question of res adjudicata as it now comes before us." (Italics added.)

Again at 308 U. S. p. 377, in the same case, the court observed:

> "* * * *If the contention is one as to validity, (of a State statute) the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application.* * * *"* (Parenthetical matter and italics added)

In the case of *Shepard* v. *Barron,* 194 U. S. 553, the facts were as follows: The Supreme Court of the United States in the case of *Village of Norwood* v. *Baker,* 172 U. S. 269, held unconstitutional an ordinance of a municipality of Ohio providing for special assessments upon abutting property by the front foot without taking special benefits into account.

After this decision and prompted thereby the owners of certain land adjoining the municipality of Columbus in that State, who had prior to said decision petitioned the County Commissioners to lay out a road through their land, under which an assessment under the unconstitutional law was made against them, sought to avoid the assessment, but the court held that they were estopped to raise the question of the unconstitutionality of the assessment, notwithstanding the decision in *Norwood* v. *Baker, supra,* relied upon by them. The relevant portions of the opinion follow:

(Page 566) "Although the land owners have been greatly disappointed in the results of the improvement, and the affair has proved somewhat disastrous, yet they have obtained just such an improvement as they asked for and expected, and they are the ones to bear the disappointment and loss. * * *

(Page 567) "On principles of general law, we are satisfied that the plaintiffs are not in a position to assert the unconstitutionality of the act under which they petitioned that proceedings should be taken, and that the assessment should be made in accordance with those provisions. * * *

(Page 568) "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. Certainly when action of this nature has been induced at the request, and upon the instigation of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid, and the expense thereof, which he ought to pay, transferred to a third person.

(Page 571) "'*The complainants invoked the action of the county commissioners to enhance the value of their land;* they actively promoted the improvement, knowing that its cost must be paid by a front foot assessment on their property; they recognized the justice of the assessment from time to time during the progress of the work, and afterwards by paying annual installments of the assessments for seven years, and until they were tempted by the decision of the Supreme Court in *Norwood* v. *Baker,* 172 U. S. 269, to cast their burden upon the general public; and it is now too late to complain of the method of the assessment or of the lack of the special benefits which were dissipated by the collapse of the "boom".' " (Italics added.)

If the land owners in the *Shepard* case, *supra,* were estopped from availing themselves of a decision of this Court holding the challenged provisions of the law that they assailed unconstitutional, by reason of their initiation and participation in the proceedings leading up to the void assessment; with still greater logic, may it be said that the State of Wisconsin by initiating and participating in the enforcement of the unconstitutional act in controversy is now estopped from retroactively availing itself of the decision in the *Hoeper* case, especially so in view of what this Court said in *Woodruff* v. *Trapnall,* 51 U. S. 190, page 207:

> "*We naturally look to the action of a sovereign state to be characterized by a scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals.*" (Italics added.)

It is now well established that the doctrine of waiver and estoppel with respect to the constitutionality of statutes applies both to the State and Federal governments, the same as in other cases. It is expressly stated to be the law of the land in *12 C. J. 771,* Sec. 195:

> "*The doctrine of waiver and estoppel applies to the state and federal governments the same as in other*

cases. Thus where a state has invoked the benefits of a statute or has made a statute passed by its legislature the basis of a suit it may not question the constitutionality of such statute.'' (Italics added.)

This principle was recognized as valid law in the *Amerpohl* case wherein the State court at p. 71 (225 Wis.) cited with approval the holding in *Sweeney* v. *State*, 251 N. Y. 417, 167 N. E. 519, 520, viz:

'' 'Certain it is that the state which enacted it may not be heard to complain that the enactment is void as a violation of ''due process''.' '' (Italics added.)

QUESTION II.

The Wisconsin Tax Commission, a creature of the State, was not entitled to urge the unconstitutionality, under the due process clause of the Fourteenth Amendment of the Federal Constitution, of the State statute in controversy upon the facts in this case.

It is respectfully submitted that the case at bar is squarely ruled by the decision of this Court in the case of *Columbus and Greenville Railway Company* v. *W. J. Miller, State Tax Collector* (1931), 283 U. S. 96. The facts in that case were that the Railroad Company paid a tax at a certain rate per mile under the provisions of Chapter 259 of the laws of Mississippi of the year 1926, whereas, the collector sought to impose a tax under Chapter 282 of the Laws of 1914, prescribing a larger rate per mile. In order for the collector to be successful it was necessary for him to allege the unconstitutionality of the later law. The court in holding that he had no standing to thus challenge the constitutionality under the Fourteenth Amendment of the law of his creator notwithstanding his authority under State law to assail in the courts of the State the constitutional validity

of a State statute, expressly ruled as follows: Pages 99 and 100:

> "We are not concerned with any question of the state's policy in imposing taxes, or with the various methods employed in the levee district, apart from the application of the Fourteenth Amendment. The question as to the validity of the act of 1926 is raised only by the state tax collector in his official capacity, as one acting solely under the authority of the Legislature whose requirement he contests. The only person taxed by the statute whose rights are before the court is the petitioner, which seeks to uphold the state legislation which defines its liability and with which it has complied. The questions which the collector sought to raise under the State Constitution have not been passed upon by the state court. While, so far as state practice is concerned, the authority of a public officer to assail in the courts of the state the constitutional validity of a state statute is a local question, this fact does not alter the fundamental principle, governing the determination of the federal question by this court, that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."

It will be noted that in the *Hoeper* case the Tax Commission did not challenge the constitutionality of the Act under the Fourteenth Amendment, but that said challenge was solely at the suit of a private citizen. Under the principles of law discussed in the first and second branches of the argument in which it has been shown that the suit of the petitioner is separate and distinct from the suit of Hoeper and that the decision in the *Hoeper* case has no retroactive application to this case, it is clearly made to appear that

it was only by urging the unconstitutionality of the statute in question in its application to the petitioner that the Tax Commission could possibly prevail. But as will be seen from the *Columbus and Greenville Railway Company* case, the Tax Commission had no standing to urge this contention in view of the fact that that decision was not automatically and retroactively binding on Miller.

As was said in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, at p. 377:

> "* * * *If the contention is one as to validity, (of a state statute) the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application.* * * *" (Parenthetical matter and italics added.)

Question III.

It was not within the competency of the State to disregard the petitioner's waiver of the asserted unconstitutionality of the statute in controversy under the due process clause of the Fourteenth Amendment.

That the individual may waive his constitutional rights at this late day does not appear to require the citation of authority. That such waiver may be effected either by a written memorial or a course of conduct is also clear. When, however, we speak of the waiver of constitutional rights, we are not limited to the conception of that term as applied to transactions not involving constitutional considerations. When a citizen waives a constitutional right, it is plain that he elects not to avail himself of a right guaranteed by the organic law, very often for the reason that he considers it to be to his advantage to conform to the invalid act rather than to resist it. For example, when a defendant in a criminal case elects to waive the right of trial by jury, he undoubtedly does so, as any student of human nature must know, because he believes that an advantage will accrue to

him by submitting to a trial by the court rather than by trial to a jury. In other words, when we speak of the waiver of constitutional right it does not follow that the waiver is none the less binding on the State merely because by waiving such right the citizen obtains a benefit which he would not otherwise secure. Let us take another illustration, A does work for B under an unconstitutional statute. B elects to waive the unconstitutionality of the statute in order to collect therefor from A. He elects to waive his constitutional right to have the statute declared unconstitutional. Why? Because it is to his benefit to waive that right. The point of this argument is that when a citizen elects to waive the constitutional rights guaranteed him by the organic law he invariably does so, human nature being what it is, for the reason that such waiver actually benefits him or because he believes such waiver would be beneficial to him.

That the petitioner has not waived his constitutional rights is clearly without merit. The petitioner has expressly declared in all the various stages of this proceeding his acquiescence in and waiver of the unconstitutionality of the state statute as applied to him.

But aside from this consideration, the Court may take judicial notice of the fact that there were many prosperous years intervening between the enactment of the challenged provisions in 1911 and the Hoeper decision in 1931, and the requirement of the challenged statutes for taxing the income of husband and wife as a unit by aggregating their combined incomes was then in no sense advantageous to the petitioner. The state, undoubtedly, gained material advantage at the expense of married taxpayers during this long period by requiring them to report their income as a unit. The State, therefore, should not accordingly be allowed to blow hot and cold with respect to the validity of the enforcement of this statute so far as its retroactive application is concerned.

As was observed supra in *Woodruff* v. *Trapnall*, 51 U. S. 190, p. 207:

> "We naturally look to the action of a sovereign state to be characterized by a scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals."

Question IV.

The constitutionality of the statute in controversy (it is still on the statute books of the State of Wisconsin) should be upheld as valid legislation for the reasons set forth in the dissenting opinion of Justices Stone, Brandeis and Holmes in the case of Hoeper v. *Tax Commission of Wisconsin, 284 U. S. 206, and the unanimous opinion of the Supreme Court of Wisconsin in Hoeper* v. *Wisconsin Tax Commission, 202 Wis. 493.*

At the risk of needless repetition, it is respectfully submitted that the dissenting opinion of this Court in the *Hoeper* case (*Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, 218), written by Justice Holmes and concurred in by Justices Brandeis and Stone, wherein it was held that husband and wife, as members of a distinct status, namely, the marital status, were subject to classification for taxation on a different basis from that of persons not sustaining that status, and that accordingly the state statute in controversy was a valid exertion of legislative power by the state, is a correct exposition of constitutional law with respect to the subject of classification for tax purposes and that this Court may, and it is hoped will, embrace the earliest opportunity to overrule the majority opinion because of the fallacy inherent both in the premise and conclusion reached therein, and because it is so patently out of harmony with the great weight and preponderance of the decisions of the Court on the subject of classification for purposes of taxation. Prior to the decision of this Court in

the *Hoeper* case, the State Supreme Court had twice affirmed the validity of this statute under the Fourteenth Amendment in the cases of *Income Tax Cases,* 148 Wis. 456, 513, and *Hoeper* v. *Wisconsin Tax Commission,* 202 Wis. 493.

The major premise of the majority opinion in the *Hoeper* case rests upon the proposition that to tax A on B's income is an arbitrary exercise of legislative power, and that since one spouse is made to measure his income by the income of the other spouse, the conclusion followed that he was arbitrarily taxed for the income of another. But the premise, it is respectfully submitted, is an over-simplification and a generalization which is at war with the constitutional principle of classification for purposes of taxation.

A familiar illustration of the fallacy lurking in the premise is that afforded by the taxation of the earnings of a corporation. Ignoring for the purposes of argument the legal fiction by which a corporation is erected into a juridical person distinct from its stockholders and looking only to substance and disregarding form, it is a realistically incontrovertible proposition that the corporate entity is but an association of individuals, namely, the stockholders, endowed by municipal law with certain privileges and immunities. Yet to tax their collective earnings in the form of a corporate tax has never been condemned or thought arbitrary as a tax imposed upon one stockholder measured by the income of the corporation, for in the same year in which the corporation may have had net earnings the individual stockholder may have had a loss exceeding his share of the undivided earnings. But, because of the corporate fiction, his share of such undivided earnings is, nevertheless, subject to tax. Therefore, it would appear to be inaccurate to say that a tax on A measured by the earnings of B is necessarily arbitrary for the reason that it does not take into account the special relationship which may exist between A and B making the one or the other, or both, mem-

bers of a distinct class. The relationship between husband and wife is very much closer than the relationship of a stockholder to his corporation. If one may be taxed for the earnings of the other, it is not perceived why the other may not be similarly taxed. If the corporate status affords a legitimate basis for classification, the marital status, it would rationally appear, is an even more reasonable basis of classification, the family unit being grounded on the natural order and being in the nature of things a natural group distinct from all others.

This Court, as late as the case of *New York Rapid Transit Corporation* v. *City of New York* (1938), 303 U. S. 573, in an exhaustive opinion by Justice Reed, said (p. 578):

> "The power to make distinctions exists with full vigor in the field of taxation, where no 'iron rule' of equality has ever been enforced upon the states."

Question V.

A recurrence to fundamenal principles in support of the argument should not be out of order.

When this Court declares an act of the State Legislature unconstitutional, it does not repeal the act; so much is axiomatic; it merely rules in its application to the particular party challenging the act that *he*, under the specific facts obtaining with respect to *him*, is not bound by it. Only by virtue of the doctrine of stare decisis is that decision binding on another suitor when he is called upon to meet a similar exaction, but then only when the facts in his case are in all material respects the same as the facts in the other. In such other case, notwithstanding the doctrine of stare decisis, the Court may be obliged to hold that a party has been estopped to raise the question of the invalidity of the statute by procuring its enactment and enforcement or by acting thereunder and this in spite of a prior decision hold-

ing the same or precisely similar act unconstitutional, as was the case in *Daniels* v. *Tearney*, 102 U. S. 415; *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, and *Shepard* v. *Barron*, 194 U. S. 553, supra.

When, therefore, the state tax commission, relying upon the *Hoeper* case, retroactively assessed taxes against the petitioner, it challenged the constitutionality of the statutes in their application to him on the ground that the *Hoeper* decision would also be held to apply to the petitioner notwithstanding the fact that the challenge there was made by Hoeper and not the state which had enacted and enforced the Act, and notwithstanding that the petitioner unlike Hoeper had acquiesced unequivocally and beyond cavil in its application to him and had elected not to stand on his constitutional rights; in other words, the commission erroneously adopted the doctrine that, with respect to any subsequent litigation, a decision once declaring an act unconstitutional was thereafter absolutely and unqualifiedly retroactive in its application to any party who might have come within the ambit of the act regardless of the facts in his case materially differing from the facts giving rise to the decision in the first case.

It should be here observed that the legal philosophy underlying the retroactive effect of judicial decisions in the light of the evolution of modern jurisprudence is now a legal fiction. The early common law courts merely undertook *to apply* the immemorial custom of the community to the facts in a given case. It did not purport to promulgate the custom. The community affected was not deemed to rely for their knowledge of the custom on the judicial pronouncement of the tribunal but rather on such immemorial custom, which alone was assumed to be well known to the community. Under modern conditions, in a society such as ours, is it at all accurate to say that the citizens rely upon

immemorial customs well known to them? The question is rhetorical and admits but one answer—they do not. They have now come to rely upon the law as previously declared and applied by the courts and upon written codes, as their provisions are defined and applied by the courts. The doctrine of stare decisis is a recognition of this phase of evolution in the administration of the law. The theory of an unchanging immemorial custom is an historical phase in the development of the law, which, applied to modern conditions, must inevitably and unreasonably work much disorder and hardship on the members of society. This was early recognized by the courts with respect to decisions announcing rules of property. The courts realized that even though the particular rule of property was unsound, if they undertook to upset it, the retroactive fiction of judicial decision would upset many titles to such an extent that the chaos resulting would be more serious than the perpetuation of the error. The point here made is that the courts should not lend their aid to an enlargement or arbitrary enforcement of this fiction, especially where the exigencies of the case do not require its application as in the case at bar.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that the writ prayed for be granted to the end that this Court may review and ultimately reverse the decision of the Supreme Court of Wisconsin because of the errors of law hereinbefore assigned.

A. W. Schutz,
Attorney for Petitioner.